SPLITTING A CAUSE OF ACTION UNDER THE NEW MICHIGAN COURT RULES: ALTERNATIVE INTERPRETATIONS

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AT the recently held Michigan Judicial Conference[1] most of the circuit judges of the State of Michigan gathered together to engage in discussions of the major reform of Michigan practice and procedure to take effect on January 1, 1963.[2] In the seminars conducted by this writer the rules provision which evoked the greatest interest, if not the greatest confusion, was a clause designed to mitigate some of the effects of the traditional rule against splitting a cause of action.[3] In light of the controversy and attendant litigation which this novel provision is likely to stir up, a brief discussion of the problems it creates coupled with alternative suggestions for its interpretation might prove useful. Such a discussion is the purpose of this short comment.[4]

Decisional law has firmly established the rule against splitting causes of action in Michigan.[5] It is a "rule of justice" designed to protect defendants from "double vexation for the same thing."[6] In essence it requires plaintiff to bring his entire cause of action in a single suit, rather than to bring several suits based on different claims arising out of the same cause. Should plaintiff violate the rule against splitting, the defendants who are subjected to subsequent suits based on the original cause of action may have the later suit or suits dismissed on timely interposition of the defense of res judicata.[7] The Michigan

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1. Conference at the Dearborn Inn, Dearborn, Michigan, September 18 and 19, 1962.

2. Brought about by the Michigan Revised Judicature Act of 1961 and the Michigan General Court Rules of 1963, both to take effect on January 1, 1963.

In this article the Revised Judicature Act will be referred to as RJA; the General Court Rules as GCR.

3. GCR 203.1 (1963) provides in part: "Failure by motion or at the pretrial conference to object . . . to a failure to join claims required to be joined constitutes a waiver of the required joinder rules, and the judgment shall not merge more than the claims actually litigated."

4. For an earlier discussion of the splitting rule and the new provision see Blume, The Scope of a Cause of Action—Elimination of the Splitting Trap, 38 Mich. S.B.J. 10 (Dec. 1959).

5. See, e.g., Szostak v. Chevrolet Motor Co., 279 Mich. 603, 273 N.W. 284 (1937), and cases there cited.

6. Dutton v. Shaw, 35 Mich. 431, 433 (1877).

7. Defendant has been permitted to amend his answer to raise the defense of

Supreme Court has held, for example, that plaintiff, having already prosecuted an action to recover the purchase price of some staves delivered by him to the defendant, could not prosecute a second action against the same defendant to recover the purchase price of other staves furnished under the same contract;[8] that injuries to a person and his property caused by a single tort create but one cause of action which cannot be prosecuted in two separate actions;[9] that a plaintiff suing to recover for breach of an employment contract must bring a single action to recover all the damages for the breach, accrued and anticipated, and may not divide the contractual employment period into chronological portions, bringing successive suits for the damages accruing as each portion expires;[10] and that a "single continuous tort" causing damages to two buildings jointly owned by plaintiffs constitutes but one cause of action, so that plaintiffs, having unsuccessfully prosecuted a suit to recover damages to the first building, were barred from bringing a subsequent action to recover the damages to the second building.[11]

The theory underlying the Michigan cases seems to be that the scope of a single cause of action is determined by reference to the transaction or occurrence which gave rise to the various claims, rather than to the particular right of the plaintiff which has been infringed.[12] This approach would seem to further the policy of the rule against splitting, since the defendant will not, in theory, be subjected to multiple suits and the attendant vexation by virtue of a single incident.[13] Nonetheless, it is not always easy to determine whether

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res judicata by leave of court even after the time for amending as of right has passed, where the judgment which would bar the second suit is not rendered until the second action is well under way. See Szostak v. Chevrolet Motor Co., supra note 5. Cf. the interesting case of Continental Ins. Co. v. H. M. Loud & Sons Lumber Co., 93 Mich. 139 (1892) where plaintiff, an insurance company subrogated to a portion of the insured's claim against defendant, was barred from bringing suit on that portion even though it did not appear that any other suit on the remaining portion had been brought or had ever gone to judgment. Compare National Liberty Ins. Co. v. Foth, 254 Mich. 152, 235 N.W. 821 (1931).

8. Dutton v. Shaw, supra note 6. Also see Brewster Loud Lumber Co. v. General Builders' Supply Co., 228 Mich. 559, 200 N.W. 283 (1924) and Corey v. Jaroch, 229 Mich. 313, 200 N.W. 957 (1924).

9. Tuttle v. Everhot Heater Co., 264 Mich. 60, 63, 249 N.W. 467 (1933) (dictum).

10. Arnold v. Masonic Country Club, 268 Mich. 430, 256 N.W. 472 (1934). The same rule applies as to continuing torts. See Thompson v. Ellsworth, 39 Mich. 719 (1878).

11. Szostak v. Chevrolet Motor Co., supra note 5.

12. See Committee Comment to GCR 203.1 (1963) in Callaghan's Mich. Pl. & Pr., Rules, 67 (2d ed. 1962).

13. It should be noted that the Michigan Supreme Court has refused to permit multiple plaintiffs, holding several claims arising out of a single course of conduct by the defendant, to join all their claims in a single suit. See Hardware Dealers Mut. Ins. Co. v. R. H. Hidey, Inc., 349 Mich. 490, 84 N.W.2d 795 (1957). Such refusal does

various claims constitute a single cause of action or several causes, even under the Michigan view. The difficulty is created by the uncertainty as to whether defendant's activities constitute a single transaction or occurrence or several transactions or occurrences, as where defendant in an altercation with plaintiff is alleged to have assaulted the plaintiff and slandered him as well.[14]

Furthermore, the phrase "cause of action" rests on shifting sands, its definition frequently changing in accordance with the particular procedural problem before the court.[15] Thus, for example, when plaintiff in *Talbot v. Stoller*[16] sought to amend her declaration after the statute of limitations had run, the court held that the proposed amendment, which added new claims based essentially on the conduct of the defendant which was the basis of the original declaration,[17] constituted a new cause of action.[18] The policy behind the statute of limitations—to prevent the presentation of stale claims of which the defendant was not aware prior to the expiration of the limitations period—might well justify such a result. But it does not follow that the court intended by its holding in *Talbot v. Stoller* to permit a plaintiff to bring multiple suits against a single defendant based on different theories of recovery or different damages but arising out of what is literally a single occurrence.[19] Such a practice would seem to undermine the anti-vexation policy of the splitting rule.[20]

As a consequence of the difficulty of defining a cause of action for the purpose of the rule against splitting, it is possible that attorneys

not conflict with the policy underlying the splitting rule, however, since it is usually the defendant himself who objects to the joinder of the separately held claims.

14. See Clark, Code Pleading § 19 (2d ed. 1947). Also see Harris v. Avery, 5 Kan. 85 (1869).

15. See Blume, supra note 4.

16. 366 Mich. 296, 115 N.W.2d 81 (1962).

17. The original declaration sought recovery for disfigurement, shame, and humiliation resulting from the defendant doctor's allegedly negligent injection of the plaintiff with the drug "Imferon." The proposed amendment added "a new theory that there was no necessity for the injection in the first place, which the appellees should have known. As a result of this alleged negligence, there is a claim that the appellant is subjected to the danger of sarcoma induction and that the injury is the mental anguish which the appellant will suffer as a result of an awareness of this possibility." Talbot v. Stoller, supra note 16, at 301, 115 N.W.2d at 83.

18. It therefore affirmed the trial court's denial of plaintiff's motion to amend her declaration.

19. Similarly, the standards applied by the courts in determining whether or not a pleading states a cause of action should not apply to the determination of whether plaintiff has split his cause of action. For the purpose of a demurrer for failure to state a cause of action (or its modern counterpart) the courts are normally unconcerned with the question whether plaintiff has joined all his claims arising from the same occurrence or transaction. See Blume, supra note 4. But see Continental Ins. Co. v. H. M. Loud & Sons Lumber Co., supra note 7.

20. See text at note 6, supra.

will occasionally divide a single cause into separate actions. Unless the several actions are prosecuted concurrently and the defendant in one of them moves to dismiss on the ground that another action is pending for the same cause, the plaintiff may not learn that he has split his cause until defendant pleads the first judgment as a bar to a later suit. By then, of course, the damage is irreparable. Plaintiff can no longer amend the first suit to add the omitted claims.[21] It does not follow, however, that the plaintiff has been injured. If judgment in the first action was for the defendant on the merits, and if the issues actually decided and litigated in the first action were the same as those raised in the dismissed suit, amending the first action to add the omitted claim would probably have served no useful purpose. Furthermore, even if plaintiff were allowed to proceed with the second suit, defendant could raise the doctrine of collateral estoppel, thus precluding the plaintiff from contesting the issues actually decided earlier. For example, in a case where plaintiff has instituted two suits based on defendant's single act of negligence—one for injuries to his person and the other for damage to his automobile—and, after trial on the merits, judgment for defendant is entered in one of them, the rule against splitting works no real hardship on the plaintiff.[22] He has had his day in court as to the central issues of liability. If the issues in the several actions are different, however, as where a single occurrence gives rise to separate claims based on different substantive rights,[23] a judgment for defendant in the first action might not actually dispose of the issues raised in the second. In this situation it is only the rule against splitting (or the statute of limitations) which could prevent the plaintiff from pursuing the claims he omitted from the first action. Likewise, where plaintiff wins the first action on the merits, the rule against splitting may prevent him from prosecuting the rest of his claim, which may be equally meritorious.

In these two latter situations the doctrine against splitting may work an unfair hardship, particularly where the failure to join all claims arising out of the same transaction or occurrence was in-

21. But see RESTATEMENT, JUDGMENTS § 62, comment m (1942), which states: Where the plaintiff brings separate actions based upon different items included in his claim, and in none of the actions does the defendant make the objection that another action is pending based upon the same claim, a judgment for the plaintiff in one of the actions does not preclude him from obtaining judgment in the other actions. In such a case the failure of the defendant to object to the splitting of the plaintiff's claim is effective as a consent to the splitting of the claim.

22. This assumes that the plaintiff lost the first action either because he failed to meet the burden of proving the defendant negligent or because the defendant proved that the plaintiff was guilty of contributory negligence.

23. E.g., a single dispute out of which assault, battery, and slander claims arise.

advertent or innocent. Indeed, it was this hardship the framers of the new rules apparently sought to avoid by drafting rules 203.1 and 301.2 of the new General Court Rules.[24] Rule 203.1 first requires the plaintiff in his complaint to state every claim against an opposing party which "arises out of the transaction or occurrence that is the subject matter of the action."[25] It then eases the harsh requirements of compulsory joinder by adding: "Failure by motion or at the pretrial conference to object . . . to a failure to join claims required to be joined constitutes a waiver of the required joinder rules, and the judgment shall not merge more than the claims actually litigated." To further insure that compulsory claims are not inadvertently overlooked, the judge at the pretrial conference is directed by rule 301.2, in every case, to "inquire of the parties as to whether or not all claims arising out of the transaction or occurrence that is the subject-matter of the action have been joined as required by subrule 203.1 and he shall include the answers and any order entered pertaining to this subject in his pre-trial summary of results."

While on their face these provisions seem simple enough, they are open to a variety of interpretations.

First, the words may be given their broadest construction: *Any* claim arising out of the transaction or occurrence which is the basis of the original action which is omitted for *any* reason, knowingly or not, may be the basis of a new action unless the *defendant* files his objection to the failure to join. It would not matter whether the omitted claim is one which would traditionally be considered the basis of a separate suit—as in the slander-assault hypothetical—or whether the claim is one which is traditionally pursued as an element of a larger claim—as a claim for damage for a specific type of injury in a negligence action. Furthermore, the defendant's ability or inability to discover the existence of the omitted claim in time to make his objection to the failure to join would not be a matter to be considered in determining whether a subsequent suit on the omitted claim could be brought. Likewise, the plaintiff's innocence, lack of diligence, or intention in omitting a compulsory claim would be irrelevant. Lastly, a new action could be brought irrespective of whether the plaintiff won or lost the first action.[26]

As a corollary to this "broad" approach, the objection required of the defendant would have to particularize the claim omitted; a general

24. See Committee Comment to GCR 203.1 (1963) in Callaghan's Mich. Pl. & Pr., op. cit. supra note 12.

25. Unless it requires "for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." GCR 203.1 (1963).

26. See text infra, at p. 509.

objection to non-joinder would not operate to bar a subsequent suit on the omitted claim.[27] Similarly, the judge or the opposing party at the pretrial hearing would not be permitted to force the plaintiff to waive his right to bring another action by requiring him to agree, in general terms, that all compulsory claims have been joined.

The impact of this interpretation of the rules under consideration is really to replace the anti-vexation policy of the rule against splitting with a policy favoring the presentation of all meritorious claims. While the adoption of this new policy would constitute a major change from the court's former attitude toward multiple actions to recover for claims arising out of the same transaction, it would not necessarily increase vexatious litigation, for several reasons. In the first place, the statute of limitations would still operate as a boundary limiting the time within which additional actions arising out of the same transaction could be brought. Secondly, the doctrine of collateral estoppel would prevent the re-presentation in open court of evidence relating to issues which have already been litigated and decided in an earlier action.[28] Thus in many cases the new action based on a claim arising out of the original transaction could be settled by a partial summary judgment,[29] plus a trial on the question of damages only. Or, if plaintiff lost the first action, and the liability issues were the same, the doctrine of collateral estoppel would effect the entire disposition of the second action. Thirdly, it is open to question whether multiple actions arising out of a single transaction are really vexatious. This is illustrated by the fact that in cases involving multiple plaintiffs suing to recover for claims arising out of a single tortious act of the defendant—as opposed to cases in which one plaintiff brings multiple claims—it is ordinarily the defendant who objects violently to misjoinder and demands that plaintiffs proceed separately against him.[30] If multiple suits are vexatious *per se*, one would expect defendant to be delighted to have all of the plaintiffs dispose of their claims against him in one action. But such has not been the case.

Furthermore, the benefits to be derived from this interpretation

27. Should the objection be raised by written motion, the new rules require that the grounds upon which the motion is based be stated with particularity. GCR 110.2(1) (1963).

28. The Committee Comment to GCR 203 (1963) expressly states: "Nothing in this rule changes the application of the doctrine of collateral estoppel." Callaghan's Mich. Pl. & Pr. op. cit. supra note 12. See generally Jacobson v. Miller, 41 Mich. 90, 1 N.W. 1013 (1879); and Polasky, Collateral Estoppel—Effects of Prior Litigation, 39 Iowa L. Rev. 217 (1954). Also see Restatement, Judgments § 68, comment a (1942).

29. GCR 117 (1963).

30. See, e.g., Hardware Dealers Mut. Ins. Co. v. R. H. Hidey, Inc., 349 Mich. 490, 84 N.W.2d 795 (1957).

may far outweigh the slight burdens to defendants who will be forced to defend additional suits. Conceive of the negligence case in which plaintiff's principal injuries are broken limbs, contusions and abrasions. Plaintiff is subjected to careful physical examinations by both his own physicians and defendant's physicians. Prior to and during the trial no further symptoms appear which any competent physician or specialist could detect. At the trial a modest verdict is rendered in plaintiff's favor. Imagine further that after the entry of final judgment, but before the statute of limitations has expired, one of the contusions develops into a cancerous lesion with a consequent prognosis of total disability and early death. Under current practice it is small solace to plaintiff and his family to offer as an excuse for refusing to permit further recovery the traditional retort: "You have had your day in court." If in reply it is suggested that plaintiff could have postponed suit until near the end of the limitations period, the simple answer is that an impoverished plaintiff, at least, should not have to defer recovery so long. Similar cases might be posited where the failure to press all the claims arising out of the same transaction is caused by the oversight, neglect, or even stupidity of the plaintiff's attorney. The suggested "broad" interpretation would cover even these situations. In terms of the law's image to the society, it might be far wiser to subject a defendant to an additional claim arising from the transaction which is the basis of the original suit—especially where liability in the first case was clear and the issues in the second suit are the same except for damages—than to throw up our hands and force the aggrieved plaintiff to proceed against his negligent attorney. The attendant hardship, both to the plaintiff and the lawyer coupled with the jaundiced view of lawyers and the law which the aggrieved plaintiff can be expected to develop as the dispute proceeds, should be of weighty concern to the courts; indeed, of much greater concern than the hardship to the defendant who might have to defend a separate action in which most of the issues will probably be settled by collateral estoppel.[31]

It may be argued that the first interpretation gives rise to its own problems. The plaintiff's attorney may deliberately decide to sever the multiple claims in order to force defendant to settle high or to heap up a greater total verdict by separate trials than he could hope to recover in a single trial. The quick answer to this, however, is that if plaintiff

31. Of course, if the statute of limitations has run on the omitted claim the aggrieved plaintiff will usually have no other recourse than to proceed against his attorney. For the purpose of this discussion, however, we are assuming that the claim upon which the second suit is based is not barred by the statute of limitations.

is aware that he is splitting his claims this information will probably be available to defendant's attorney as well by way of discovery. The objection to non-joinder can then be raised with particularity as required by the rules, and the plaintiff can be forced to join his claims. Furthermore, in the run of the mill case, no useful purpose could possibly be served by dividing claims for damages—such as hospital expenses and pain and suffering—into separate suits.

It can also be argued that the broad interpretation of the rule fails to take into account the efficient administration of justice. That is, by permitting several actions based on a single transaction the parties are unnecessarily wasting judicial resources and crowding the dockets. To this contention it may be replied that the committee framing the rules expressly stated in their comments that "if the parties . . . desire to litigate their claims in two pieces, the harshness of the merger doctrine should not prejudice them."[32] In addition, in the cases in which the key issues in the subsequent actions are the same as those litigated in the first action, the doctrine of collateral estoppel should permit an efficient and speedy determination of the second action, if not a settlement. Thus, judicial administration would not be unduly burdened.

It might also be contended that where defendant has demanded a jury trial separate trials of different claims arising out of the same transaction might violate his constitutional right to trial by jury. Of course, the United States Constitution does not require the states to provide jury trials in civil cases involving rights created by state law.[33] The Michigan Constitution, however, provides that "the right to trial by jury shall remain."[34] In the area under discussion the problem would only arise in those cases where the defendant has demanded jury trial but has failed to object to non-joinder. Where the defendant is aware that a compulsory claim has been omitted from plaintiff's case and does not raise his objection for tactical reasons it would seem to follow that he has waived his right, if such exists, to have all the compulsory claims tried by the same jury.[35] Where the failure to object to non-joinder of related claims results from the defendant's ignorance of such claims, however, the issue is clearly framed, viz., in such case does the Michigan Constitution require that

32. Callaghan's Mich. Pl. & Pr., op. cit. supra note 12, at 68.

33. See Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916); Olesen v. Trust Co. of Chicago, 245 F.2d 522 (7th Cir.), cert. denied, 355 U.S. 896 (1957).

34. Const. 1908, art. II, § 13.

35. This would seem to be a reasonable construction to be given the constitutional provision, which provides, when read together with GCR 203.1 (1963), that in civil cases the right is waived unless properly demanded.

all the claims arising out of the same transaction or occurrence be tried by the same jury in a single trial? The problem raised by this issue is quite similar to that raised by rule 505.2, which permits separate trials on separate claims and even on separate issues. This latter provision, which has been copied verbatim from rule 42(b) of the Federal Rules of Civil Procedure, has evoked a great deal of discussion. The consensus seems to be that it does not violate constitutional principles.[36] None of the discussion, however, has been addressed specifically to the Michigan Constitution, which grants the right to trial "in such instances, and with such safeguards, as the common law accorded."[37] At common law, moreover, related claims falling under the same form of action would ordinarily be tried in a single suit with a single jury. But claims falling under different forms of action might have to be tried separately even though they arose out of the same transaction.[38] It can be argued, therefore, that there should be no constitutional barrier under the new rules for trying claims separately if, prior to the effective date of the new rules, they could not have been tried together. On the other hand if, at common law, the particular claims had to be tried together by a single jury—as in the case of different injuries to the same person arising from a single act of negligence—then they must be tried together by the same jury under the new rules, as well. The difficulty with this analysis is that it attaches too much significance to the common law procedure, constantly requires references back to that procedure, and does not take into account the fundamental nature and purpose of the jury trial. The unanimous decision of the United States Supreme Court in *Gasoline Prods. Co. v. Champlin Ref. Co.*,[39] wherein the Court approved the use of a partial new trial even though the remanded issues would have to be tried by a different jury, would seem to represent a far more sensible approach to the problem. After admitting that partial new trials had not been permitted at common law, Mr. Justice Stone continued:

> But we are not now concerned with the form of the ancient rule. It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury is that issues of fact be submitted for determination

36. See O'Donnell v. Watson Bros. Transp. Co., 183 F. Supp. 577 (N.D. Ill. 1960). Also see Miner, Court Congestion: A New Approach, 45 A.B.A.J. 1265 (1959); 5 Moore, Federal Practice ¶ 42.03 (Supp. 1961).

37. See 6 Callaghan's Mich. Pl. & Pr. § 38.06 (1947).

38. See Multiplex Concrete Mach. Co. v. Saxer, 310 Mich. 243, 17 N.W.2d 169 (1945); Brewster Loud Lumber Co. v. General Builders' Supply Co., 233 Mich. 633, 208 N.W. 28 (1926).

39. 283 U.S. 494 (1931).

> with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law. . . . Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure.[40]

Therefore, so long as the claims which are to be tried separately are sufficiently distinct and independent so that separate juries can decide them "without confusion and uncertainty,"[41] there should be no constitutional objection to separate trials.

At the Michigan Judicial Conference several other interpretations of the rules under consideration were advanced which, at the time and in the heat of discussion, seemed to make good sense. One of them would permit the defendant's attorney by motion or at the pretrial hearing to object to failure to join compulsory claims in a general way, without specifying the missing claim or claims. Alternatively, the judge at the pretrial conference, exercising his power under rule 301.2, could require the plaintiff's attorney to admit that all compulsory claims had been joined, and then record the admission in the pretrial summary. In either case the intended effect would be to prevent the plaintiff from bringing additional actions for claims arising out of the original transaction. In the first situation rule 203.1 would bring the doctrine of res judicata or its corollary, the rule against splitting, into operation. In the second situation the admission in the pretrial summary would work an estoppel which could be pleaded by the defendant in bar to a subsequent action. Of course it could be argued that the pretrial summary only controls the course of the particular action in which it is filed and cannot control other actions, or that the plaintiff, in spite of his admission, should not be estopped to bring another action unless the defendant can show that he has been injured by relying on the admission. But assuming, arguendo, that the courts permit the defendant to avoid the consequence of the rule by either method, the result is the same: the new rule is sidestepped by a simple practice which would surely become routine in every case. That is, the defendant's attorney would file his general objection to non-joinder or the trial judge would request the plaintiff to admit that all claims had been joined before permitting the case to go to trial, or both. Although it may be suggested that the rigors of the splitting doctrine might be mitigated by merely directing the attention of plaintiff's attorney in each case to the necessity of joining all compulsory claims,[42] the rules seem to require more. Otherwise rule

40. Id. at 498.
41. Gasoline Prods. Co. v. Champlin Ref. Co., supra note 39, at 500.
42. Cf. Blume, supra note 4, at p. 13.

301.2 would have been sufficient to accomplish this objective and rule 203.1 would have been unnecessary. In addition, the theory that the rule is only designed to make the plaintiff's attorney aware of the dangers of failing to join all of his claims does not take into account the cases where an attorney who is aware of such dangers is not yet aware that other claims, arising out of the same transactions, exist. In such a case the purpose of rule 203.1—to protect innocent parties from the harshness of the splitting doctrine—would be frustrated.

Other alternative interpretations were also advanced at the Conference. It was suggested, for example, that the word "claims" might be construed to mean something analogous to "rights." That is, the joinder rule might permit the separate prosecution of various rights arising out of a single transaction if defendant failed to object to non-joinder, but that the rule should not be construed to permit a plaintiff to divide a single right into several actions. On this basis it could be argued that if a "right" to recover for slander and a "right" to recover for assault arose out of the same transaction or occurrence, the plaintiff might bring two separate actions if the defendant failed to object to non-joinder. The same would be true if plaintiff suffered injury to his person and injury to his property as a result of defendant's single act of negligence. *But*, if defendant's single act resulted only in injury to plaintiff's person, then only a single right has been violated, and plaintiff should not be permitted to treat his hospital expenses and his pain and suffering, for example, as separate claims under the rule. Similarly, a broken limb and a cancerous lesion caused by a single act of the defendant would be the basis of a single right or claim, and not several claims.

The merit of this interpretation is that it represents a traditional approach to res judicata which relates a cause of action, for purposes of splitting, to a single right.[43] However, in operation it would merely substitute a more liberal splitting rule for the current Michigan rule in cases where defendant raised no objection to non-joinder. Furthermore, the determination of what constitutes a single "right" in a given case may be just as difficult to make in a particular case as determining whether there is only one "transaction or occurrence" or many. Thus, for example, in a case where the promisor in a single contract has agreed to perform several distinct acts, uncertainty might arise as to whether the promisee has only one claim arising from the single contract, or several claims on which separate actions may be brought.[44]

43. The Michigan Supreme Court applied this approach to a case arising under New York law in Tuttle v. Everhot Heater Co., supra note 9. See also Clark, Code Pleading § 19 (1947).

44. E.g., Jacobson v. Mutual Benefit Health & Acc. Ass'n, 73 N.D. 108, 11 N.W.2d 442 (1943), commented on in Blume, supra note 4, at p. 12.

If the interpretation of "claim" is restricted in the manner suggested, the chances that a plaintiff might inadvertently split a single claim increases correspondingly. And, in the situation where splitting creates the greatest injustice—where plaintiff in the exercise of reasonable diligence could not have discovered that the injuries resulting from defendant's negligent act were much more serious than he believed when he prosecuted the first action—the new rule would afford no protection. It is suggested, therefore, that the interpretation which equates "claim" with "right" be rejected.

Some judges also proposed that rule 203.1 should be construed to limit its anti-splitting protection to cases where the plaintiff in the exercise of due diligence could not have discovered that he had omitted a compulsory claim in the original suit. Somewhat similarly, a suggestion was offered that the defendant not be subjected to multiple actions arising out of the same transaction for failure to object to non-joinder of omitted claims unless by exercising reasonable diligence he could have discovered the omitted claims in time to make seasonable objection.[45]

Neither construction would seem to be wise. As to the first, the requirement of due diligence on the plaintiff's part would eliminate from the protection of the rules most of the common situations in which splitting occurs—where plaintiff's attorney through ignorance, inadvertence, or carelessness, overlooks a compulsory claim. Insofar as the rule is intended to protect "innocent parties" from losing meritorious claims through their attorney's oversight, such intent would be frustrated.[46]

As to the second construction, there is nothing in the rule which suggests that the requirement that defendant object to non-joinder is waived where he cannot be expected to know of the omitted claim. Furthermore, if plaintiff knows of the omitted claim, defendant, by diligent use of the discovery instruments available to him, should be able to learn of such claim. It is only where plaintiff himself is not aware of the existence of an omitted claim or where defendant does not utilize the discovery process for fear of alerting the plaintiff to new claims, that defendant might be ignorant of omitted claims even though he has exercised due diligence.[47] In the first instance the plaintiff

45. Some judges at the Michigan Judicial Conference proposed that GCR 203.1 be amended by adding either one or both of these suggested qualifications.

46. Committee Comment to GCR 203 (1963), Callaghan's Mich. Pl. & Pr., op. cit. supra note 12.

47. Where the defendant passes up his opportunity to seek discovery as to non-joined claims for tactical reasons he may be exercising due diligence in the protection of his client's interests. It does not necessarily follow, however, that this would satisfy the diligence requirement of rule 203.1 if that requirement were read into the rule.

should not be barred from later pressing the omitted claim, for reasons already discussed. In the second situation, the defendant, by attempting to maintain a tactical advantage, should not be permitted to frustrate the requirements of the rule. That is, if he elects not to seek discovery concerning a possible claim for fear of alerting the plaintiff, he should be deemed to subject himself to the risk that the plaintiff will later discover such claim and bring suit upon it.

Finally, the possibility that the protection against splitting rule depends upon inadvertent omission of claims is negated by the Committee Comment to the rule, which provides: "[I]f the parties . . . desire to litigate their claims in two pieces, the harshness of the merger doctrine should not prejudice them."[48]

One last interpretational problem should be mentioned. Rule 203.1 provides that failure by the defendant to object to non-joinder will result in a judgment which "shall not *merge* more than the claims actually litigated" (emphasis supplied). The use of the word "merge" in this setting could mean that the rule should only apply when the judgment in the first action is for the plaintiff. If the judgment in that action is for the defendant, then the traditional rule of res judicata which *bars* the plaintiff from bringing another suit arising out of the same transaction or occurrence should apply. In other words, the word "merge" could be interpreted in its technical sense.[49] If this interpretation were adopted a plaintiff would be barred from bringing another suit on a claim arising out of the same transaction if he lost the first suit. While this construction of the rule makes sense in cases where the issues actually litigated and decided in the first suit will be dispositive of plaintiff's claim in the second suit, it may work an injustice when the claims, although arising out of the same transaction, raise entirely different issues and require different proofs, e.g., where plaintiff seeks to recover for assault and slander arising out of the same altercation. It is suggested, therefore, that the word "merge" be interpreted in its broadest sense to include both "merger" and "bar."

CONCLUSION

It must be recognized that the first suggested interpretation of new rules 203.1 and 302.1 creates a new concept of res judicata or splitting, whereby the policy against vexation caused by multiple actions arising out of a single cause of action is subordinated to a

48. Committee Comment to GCR 203 (1963), Callaghan's Mich. Pl. & Pr., op. cit. supra note 12, at 68.

49. Cf. Luplow v. Aubry Cleaners and Dyers, Inc., 366 Mich. 353, 115 N.W.2d 110 (1962).

policy favoring the protection of plaintiffs from the loss of meritorious claims. The anti-vexation policy is not scrapped, however, since the statute of limitations and the doctrine of collateral estoppel will still operate, respectively, to bar the presentation of stale claims and to prevent the relitigation of issues once litigated.

The alternative interpretations which have been suggested would all tend to partially recreate the conditions which gave rise to the hardships sought to be eliminated by the framers of the new rules. In this respect they would tend to nullify the protective effect of the new rules.

Another important point to consider is that in the vast majority of cases the plaintiff will either join all of his "compulsory" claims automatically or the defendant will be in a position, without alerting the plaintiff to claims about which he is unaware, to object to the non-joinder of specific claims. It is only in the unique and exceptional case that the new rules will operate to license more than one action arising out of a single transaction or occurrence. When such a unique case arises, however, the possibility of hardship to the plaintiff becomes very great. And it is around these cases—the difficult ones—that the public's attitude toward the courts (and attorneys) can crystallize.

It does not seem unreasonable, therefore, to adopt the broadest possible interpretation of the rules in question—at least experimentally—in order to offer some new protection to plaintiffs even against possible incompetence of their own attorneys. Indeed, rule 13 seems to set the tone for this interpretation of the rules:

> These rules are to be construed to secure the just, speedy, and inexpensive determination of every action *so as to avoid the consequences of any error or defect in the proceedings which does not affect the substantial rights of the parties.* (Emphasis supplied.)

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